NO. 56784-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

BERT WIDMER,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Derek Vanderwood, Judge

---

# BRIEF OF APPELLANT

---

JARED B. STEED
Attorney for Appellant

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121

## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

Page

WASHINGTON CASES

## TABLE OF AUTHORITIES (CONT'D)

Page

## TABLE OF AUTHORITIES (CONT'D)

Page

## TABLE OF AUTHORITIES (CONT'D)

Page

## TABLE OF AUTHORITIES (CONT'D)

## TABLE OF AUTHORITIES (CONT'D)

Page

## TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The State failed to prove appellant Bert Widmer's California conviction for second degree commercial burglary was comparable to a Washington offense.

2. Counsel was ineffective for failing to object to the comparability of Widmer's California conviction.

3. The doctrines of collateral estoppel and res judicata barred the resentencing court from concluding that Widmer's convictions for first degree robbery and first degree burglary did not constitute same criminal conduct for offender score purposes.

4. The resentencing court erred in imposing discretionary Department of Corrections community custody supervision fees.

Issues Pertaining to Assignments of Error

1. The court included a California conviction for second degree commercial burglary in Wimder's offender score. This offense is not legally comparable to a Washington felony. Where the state failed to establish a factual comparability, did

the court err by including this offense in Widmer's offender score?

2. To the extent counsel contributed to the err by failing to object or by tacitly acknowledging comparability, did Widmer receive ineffective assistance of counsel?

3. Widmer's 2007 convictions for first degree robbery and first degree burglary were found to encompass the same criminal conduct for offender score purposes by the original sentencing court. During Widmer's 2022 resentencing pursuant to State v. Blake,[1] a different sentencing judge concluded the convictions did not encompass the same criminal conduct, and he was sentenced based upon a higher offender score. Is remand for resentencing required where the resentencing court was barred by the doctrines of collateral estoppel and res judicata from altering the same criminal conduct finding for offender score purposes?

[1] State v. Blake 197 Wn.2d 170, 481 P.3d 521 (2021).

4. Despite finding Widmer indigent and stating its intention to impose only mandatory legal financial obligation, the amended judgment and sentence nevertheless orders him to pay community custody supervision fees determined by the Department of Corrections. Based on recent Washington Supreme Court precedent, should these discretionary fees be stricken from the judgment and sentence?

B. STATEMENT OF THE CASE

Widmer was convicted in 2007 of first degree rape, first degree robbery, and first degree burglary. CP 17-36. On January 17, 2008, he appeared before Judge John F. Nichols for sentencing. See 1RP.[2] Among the issues decided at the 2008 sentencing, was whether Widmer's convictions involved the same criminal conduct and whether his out-of-state convictions

[2] This brief refers to the transcripts as follows: 1RP – January 17, 2008 (transferred from 37375-1-II by 9/26/22 order); 2RP – December 21, 2021 and February 11, 2022.

were comparable to Washington felonies for offender score purposes. 1RP 427-31.

The prosecutor argued that none of Widmer's offenses constituted the same criminal conduct.[3] 1RP 427-28; CP 36-42. The prosecutor acknowledged the offenses involved the same time, same place, and same complaining witness, but maintained that Widmer had different intents with respect to the burglary and robbery. 1RP 429. Citing the anti-burglary merger statute, RCW 9A.52.050,[4] the prosecutor also argued that the legislature intended to punish burglary separately from any crime related to the burglary. 1RP 428; CP 36-42. As the prosecutor admitted at the time, however, even under the

[3] Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

[4] RCW 9A.52.050 provides: "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."

burglary anti-merger statute, the court had discretion to find the offenses constituted the same criminal conduct. 1RP 428.

Defense counsel conceded that the rape was separate from both the burglary and the robbery but argued that the burglary and robbery encompassed the same criminal conduct. 1RP 429.

Following argument, the sentencing court concluded the burglary and robbery merged because they "involve very similar conduct, very similar intent of the same criminal conduct, same period of time, same residence involved." 1RP 430-31, 438. The trial court recognized that under RCW 9A.52.050, it had the authority to separately punish the robbery and burglary, but instead exercised its discretion and chose not to. 1RP 431, 438.

Having concluded that the burglary and robbery constituted the same criminal conduct, Widmer's offender score was decreased by two points as to each of the three convictions. 1RP 432.

The prosecutor also argued that each of Widmer's four out-of-state convictions was comparable to a Washington felony. In particular, the prosecutor argued that Widmer's 2002 California conviction for second degree commercial burglary was legally comparable to second degree burglary in Washington. CP 38-39; 1RP 426.

Defense counsel acknowledged that the prosecutor's comparability argument was "well made" but nonetheless objected on the basis that the prosecutor had "not proven them at this point and defer to the court." 1RP 426.

The trial court concluded that the out-of-state convictions appeared to meet the elements of Washington felonies and found each comparable. 1RP 426-27. Widmer was sentenced to concurrent sentences totaling 277 months. CP 17-36; 1RP 438.

Widmer appealed. His convictions were affirmed in an unpublished Court of Appeals opinion issued on August 18, 2009. See State v. Widmer, 151 Wn. App. 1048, 2009 WL 2503743 (2009). The State did not cross-appeal.

On May 3, 2021, Widmer filed a CrR 7.8 motion arguing that he was entitled to resentencing because his offender score included a conviction for possession of a controlled substance voided by State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). CP 48-53. The trial court granted the motion. CP 112; 2RP 8-9, 29.

Widmer appeared for resentencing on February 11, 2022 before Judge Derek Vanderwood. The parties agreed that pursuant to Blake, Widmer's possession of a controlled substance conviction from Nevada could no longer count toward his offender score. 2RP 12, 29. Defense counsel did not object to the prosecutor's argument that Widmer's remaining out-of-state convictions were comparable to Washington state felonies, for a total of four points toward the offender score.[5]

[5] The prosecutor represented that there was an "agreement" with defense counsel as to how the out-of-state convictions would score. Defense counsel did not object but also did not explicitly agree that the out-of-state convictions were legally or factually comparable to Washington felonies. See 2RP 12-13; CP 55-62.

2RP 12-13, 31-32. The four points included a correction from Widmer's 2008 judgment and sentence which incorrectly scored his California conviction for aggravated first degree robbery as three points, instead of two. 2RP 12, 16, 31-32.

The parties expressed confusion at the original sentencing court's standard range sentence calculations attributed to an offender score of nine. 2RP 14-19; CP 17-36. The parties reasoned that in fact the standard range sentence calculations were attributable to an offender score of eight rather than nine. 2RP 14-19.

The prosecutor acknowledged that Judge Nicholas had previously determined that Widmer's convictions for burglary and robbery constituted same criminal conduct and therefore scored as a single point against the rape conviction. 2RP 13, 16-17. Referencing RCW 9A.52.050 again, however, the prosecutor reasoned "that was an incorrect decision." 2RP 13. The prosecutor nonetheless acknowledged that whether to apply the anti-merger statute was a "discretionary call to the judge[.]"

2RP 16. Citing its original 2008 sentencing memorandum, however, the prosecutor "renew[ed]" its argument that the offenses should not constitute same criminal conduct. 2RP 13; CP 36-42. The prosecutor believed that Widmer should be sentenced based on an offender score of eight. 2RP 13, 16.

Defense counsel maintained that the 2008 sentencing court properly exercised its discretion in finding that the burglary and robbery convictions constituted same criminal conduct. 2RP 19-21. Defense counsel argued that for the trial court to reconsider that prior finding would violate the principles of collateral estoppel and res judicata. 2RP 21. Based on that prior finding, counsel argued that Widmer should be sentenced based on an offender score of six. 2RP 21, 25; CP 55-112.

The trial court agreed with the prosecutor that Judge Nichols' 2008 sentencing decisions were not controlling. 2RP 17, 22. The trial court concluded that Widmer's three out-of-state convictions were comparable to Washington offenses, for

a total of four points. 2RP 31. The trial court also concluded the robbery and burglary convictions should not be considered the same criminal conduct. The trial court explained,

> I think that's appropriate in light of the anti-merger statute as well as the other information presented. And while the court would have discretion to merge those, I do not think it is appropriate to do that here. So as a result my calculation for the offender score on all three of these is eight points.

2RP 32.

Based on an offender score of eight, Widmer was sentenced to an indeterminate sentence of 277 months to life for the rape conviction. 2RP 33; CP 122-40. Concurrent sentences of 102 months and 144 months were imposed on the burglary and robbery convictions. Finding Widmer "presently indigent" the trial court "waive[d] non-mandatory financial obligations." 2RP 33; CP 122-40.

Widmer timely appeals. CP 140-69.

C. ARGUMENT

**1. The trial court erred by including a California conviction for second degree commercial burglary in Widmer's offender score because it is not comparable to a Washington felony.**

Widmer's 2002 California conviction for second degree commercial burglary is not comparable to a Washington felony. The court erred by including this offense in Widmer's offender score. Widmer maintains defense counsel did not acknowledge comparability. But to the extent counsel did, Widmer received ineffective assistance of counsel. Resentencing is required. State v. Arndt, Jr., 179 Wn. App. 373, 320 P.3d 104 (2014).

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the sentencing court uses the defendant's prior convictions to determine an offender score, which along with the "'seriousness level'" of the current offense establishes his or her presumptive standard sentencing range. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (quoting State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994)).

The State must prove the existence of prior felony convictions used to calculate an offender score by a preponderance of the evidence. Ford, 137 Wn.2d at 479–80; see also RCW 9.94A.500(1). If the convictions are from another jurisdiction, the State also must prove that the conviction would be a felony under Washington law. Ford, 137 Wn.2d at 480. "The existence of a prior conviction is a question of fact." In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010).

Where the defendant's offenses resulted in out-of-state convictions, RCW 9.94A.525(3) provides that such offenses "shall be classified according to the comparable offense definitions and sentences provided by Washington law." This statute requires the sentencing court to make a factual determination of whether the out-of-state conviction is comparable to a Washington conviction. State v. Morley, 134 Wn.2d 588, 601, 952 P.2d 167 (1998) (citing former 9.94A.360 (1996), recodified as RCW 9.94A.525 by Laws of 2001, ch. 10,

§ 6). Only if the convictions are comparable can the out-of-state conviction be included in the offender score. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

Our Supreme Court has adopted a two-part analysis for determining whether an out-of-state conviction is comparable to a Washington conviction. Thiefault, 160 Wn.2d at 414–15. First, the sentencing court determines whether the offenses are *legally* comparable – i.e. whether the elements of the out-of-state offense are substantially similar to the elements of the Washington offense. Thiefault, 160 Wn.2d at 415. If the elements of the out-of-state offense are broader than the elements of the Washington offense, they are not legally comparable. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

Second, even if the offenses are not legally comparable, the sentencing court can still include the out-of-state conviction in the offender score if the offense is *factually* comparable. Thiefault, 160 Wn.2d at 415; Lavery, 154 Wn.2d at 255.

Determining factual comparability involves analyzing whether the defendant's conduct underlying the out-of-state conviction would have violated the comparable Washington statute. Thiefault, 160 Wn.2d at 415.

The sentencing court may "look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute." Lavery, 154 Wn.2d at 255. In making this factual comparison, sentencing courts may consider only facts that were "admitted to, stipulated to, or that were proved beyond a reasonable doubt." Thiefault, 160 Wn.2d at 420 (explaining this rule is compelled by Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); accord Lavery, 154 Wn.2d at 258. The elements of the charged crime remain the cornerstone of this inquiry because "'[f]acts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently

proven in the trial.'" Lavery, 154 Wn.2d at 255, (quoting Morley, 134 Wn.2d at 606).

If an out-of-state conviction involves an offense that is neither legally nor factually comparable to a Washington offense, the sentencing court may not include the conviction in the defendant's offender score. Thiefault, 160 Wn.2d at 415. A challenge to the classification of an out-of-state conviction is reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 997 P.2d 941 (2000).

a. Widmer's 2002 California conviction for second degree commercial burglary is not legally or factually comparable to Washington burglary.

Division One of this Court has already held that California burglary is not legally comparable to Washington burglary. State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006), rev. denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007). Under Cal. Penal Code sec. 459:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill,

> barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Cal. Penal Code § 459 (West). The statute has remained unchanged since 1991. See 1991 Cal. Legis. Serv. Ch. 942 (A.B. 628) (West).

As the court in Thomas recognized, the California burglary statute is much broader than Washington's, which

requires proof of an unlawful entry. 135 Wn. App. at 478, 483, 486. Indeed, RCW 9A.52.030 requires:

> (1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

California burglary also encompasses a much broader range of property. Thomas, 135 Wn. App. at 478.

Widmer was convicted under the same section of the California Penal Code found to be legally incomparable to RCW 9A.52.030 in Thomas. See CP 192-99. Because the California burglary is not legally comparable to a Washington felony, the court could not include it in Widmer's offender score unless the state proved factual comparability. See Thomas, 135 Wn. App. at 483-84. The state failed to do so.

The State provided copies of Widmer's 2002 charging document, misdemeanor plea of no-contest, clerk minutes, and summary probation order. See CP 192-99.

The amended complaint alleged that Widmer willfully and unlawfully entered a commercial building occupied by a supermarket with the intent to commit larceny and any felony. CP 199. The misdemeanor plea form indicates that Widmer is pleading "no contest" to the amended charge. Id. at 9-11.

Though the amended complaint alleged facts ostensibly comparable to second degree burglary in Washington, this is insufficient. In Descamps v. United States, the U.S. Supreme Court explained that, in a jury trial, "the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." 570 U.S. 254, 133 S. Ct. 2276, 2288, 186 L. Ed. 2d 438 (2013). The same is true when an individual pleads guilty: "he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." Id. (citing Shepard v. United States, 544 U.S. 13, 24-26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)).

As mentioned, the Washington Supreme Court has likewise recognized "the elements of the charged crime must remain the cornerstone of the comparison." Lavery, 154 Wn.2d at 255 (quoting State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). This is in part because the defendant "often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to." Descamps, 133 S. Ct. at 2289; accord Lavery, 154 Wn.2d at 258 (noting defendant had "no motivation in the earlier conviction to pursue defenses" that would have been available to him under Washington law but unavailable in the foreign jurisdiction).

Indeed, citing Lavery, the Thomas court rejected the very notion that inclusion of "unlawfully" language in the charging documents renders a California burglary conviction factually comparable to Washington burglary. 135 Wn. App. at 484-87. Thomas was convicted of two counts of burglary in California in 1980 and 1982. The 1980 charge stated:

> The People of the State of California upon oath of O. KNUDSON complain against the defendants above named for the crime of *violation of section 459 of the Penal Code of the State of California* committed as follows: That on the 20th day of January, 1980, at and in the County of Sacramento, State of California, the defendants UECCLE VONNER, JR., LASHAUN MITCHELL AND MICHAEL ANTHONY STANLEY then and there before the filing of this complaint, *did willfully, unlawfully and feloniously enter SEARS,* located at Sunrise Mall, with intent to commit larceny.

Thomas, 135 Wn. App. at 484 (emphasis in original).

Thomas's 1982 burglary charged contained similar language:

> TIMOTHY D. THOMAS aka GREGORY L. THOMAS is accused by this information of the crime of violation of section 459 of the Penal Code of the State of California committed as follows: That on the 19th day of June, 1982, at and in the County of Sacramento, State of California, the defendant TIMOTHY D. THOMAS aka GREGORY L. THOMAS then and there before the filing of this information, *did willfully, unlawfully, and feloniously enter a business, to wit, CONVENIENCE FOOD MART,* located at 3291 Mather Field Road; with intent to commit larceny.

Id.

Thomas pled guilty to the 1980 charge, with the judgement and sentence stating, "Where as the said Gregory Leon Thomas having on 4–3–80 duly pled guilty in this Court of the crime of violation of Section 459 of the penal code, as alleged in the Complaint." Id. at 485. A jury convicted Thomas of the 1982 offense, concluding, "We, the Jury in the above cause, find the defendant, GREGORY L. THOMAS, guilty of the crime of violation of Section 459 of the Penal Code of the State of California (burglary) as charged in Count Three of the Information No. 63894." Id.

Thomas concluded that none of this language demonstrated that the offenses were factually comparable to Washington's burglary statute. 135 Wn. App. at 484-87. First, the court noted that the allegation that Thomas's entry was "unlawful" did not relate to an element of the burglary statute. As a result, it could not assume those facts were proven or admitted. Id. at 486 (citing State v. Bunting, 115 Wn. App. 135, 61 P.3d 375 (2003)). Second, the court noted that the record did

not establish that Thomas either stipulated to or admitted the unlawful entry allegation even by pleading guilty. Id. at 487.

Like Thomas, while Widmer pled to the amended charge which included "unlawfully" language in the charging document, this is insufficient to prove factual comparability. Nowhere in the plea did Widmer stipulate or agree to the facts as alleged in the amended information. Supp. CP 193-95. Moreover, the record does not establish any factual basis whatsoever for the offense. The State accordingly failed to prove Widmer's 2002 California conviction for second degree commercial burglary is factually comparable to a Washington felony. Remand for resentencing is required.

b. Widmer did not waive the sentencing error.

In response, the prosecution may argue Widmer waived the error because he affirmatively acknowledged the California burglary was properly included in his offender score. Any such argument should be rejected.

Although defense counsel did not object to inclusion of the conviction in the offender score, he also did not explicitly agree that the out-of-state convictions were legally or factually comparable to Washington felonies. See 2RP 12-13; CP 55-62. This is merely an agreement that the convictions exist, not that they are comparable. Thus, there was no "affirmative acknowledgment" the burglary was comparable.

Division Three of this Court has recently held the same under similar conditions. State v. Richmond, 3 Wn. App. 2d 423, 415 P.3d 1208 (2018). There, the defense agreed with the state's offender score calculation. But the court held such did not amount to an affirmative acknowledgment of comparability:

> A defendant's mere agreement with the State's offender score calculation and admission of the existence of an out-of-state conviction is insufficient to constitute an affirmative acknowledgment that an out-of-state conviction meets the terms of the comparability analysis.

Richmond, 3 Wn. App.2d 423 (2018) (citing State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010)).

The circumstances here are no different – there was mere agreement to the existence of the out-of-state conviction. This Court should find the sentencing error is preserved. But in the event, it does not, Widmer received ineffective assistance of counsel.

**2. Widmer received ineffective assistance of counsel at sentencing.**

Although Widmer disputes that his counsel agreed to comparability, this Court should find that any agreement or acknowledgement was deficient as well as prejudicial under the rule set forth in Thiefault.

Every criminal defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel.

Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Counsel's failure to object to the inclusion of the out-of-state convictions has, in similar circumstances, been held to be ineffective assistance. Thiefault is instructive here.

There, Thiefault's attorney failed to object to the comparability of Thiefault's attempted robbery conviction from Montana. Thiefault, 160 Wn.2d at 414. The Court of Appeals agreed Thiefault's attorney provided deficient performance by failing to object, because the Montana offense was broader than its Washington counterpart. The Court further concluded it could not determine whether the offenses were factually comparable because the record provided by the state – including a motion for leave to file information, an affidavit from a prosecutor, and a judgment – did not include facts Thiefault admitted. Thiefault, 160 Wn.2d at 415-16.

Nevertheless, the Court of Appeals found Thiefault could not establish his counsel's failure to object to the comparability analysis prejudiced his case. The court reasoned that the superior court would likely have given the state the opportunity to obtain information properly establishing the facts underlying Thiefault's Montana conviction had his attorney objected. The court further reasoned that Thiefault did not demonstrate a reasonable probability that the facts underlying the Montana conviction would not have satisfied the Washington crime. The court therefore concluded Thiefault's counsel was not ineffective. Thiefault, 160 Wn.2d at 416.

The Supreme Court agreed counsel provided deficient performance by failing to object to the comparability of the Montana conviction but disagreed that Thiefault had not established prejudice. Thiefault, at 417.

> The Court of Appeals improperly found that such deficient representation did not prejudice Thiefault. Although the state may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is

> equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable[.]

Thiefault, 160 Wn.2d at 417.

The court vacated Thiefault's sentence and remanded the case to superior court to conduct a factual comparability analysis of the Montana conviction. Id. Cf. State v. Birch, 151 Wn. App. 504, 213 P.3d 63 (2009), (finding counsel was not ineffective for failing to object to the absence of a comparability analysis of a California robbery conviction where Birch did not dispute conviction and explicitly agreed in writing that California conviction was equivalent of a Washington felony offense for offender score purposes), rev. denied, 168 Wn.2d 1004 (2010).

Like Thiefault, Widmer was prejudiced by his attorney's failure to object. This is especially true given that the Thomas opinion – demonstrating both the legal and factual incomparability of California commercial burglary – was in existence well before either of Widmer's sentencings.

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691).

The California burglary conviction was used in calculating Widmer's offender score. Given the age of Widmer's California conviction, it is highly unlikely that the state would be able to provide more documentation about the specifics of the convictions beyond what had already been disclosed. This Court should vacate Widmer's sentence and remand for resentencing. Thomas, 135 Wn. App. at 488.

### 3. The doctrines of collateral estoppel and res judicata barred the resentencing court from altering the same criminal conduct finding for offender score purposes.

The original sentencing court exercised its discretion and concluded that Widmer's 2007 convictions for first degree robbery and first degree burglary encompassed the same criminal conduct for offender score purposes. The State did not

appeal this finding. During Widmer's 2022 resentencing under Blake, the state again argued the robbery and burglary convictions did not involve the same criminal conduct. A different sentencing judge agreed, and Widmer was sentenced separately for the robbery and burglary convictions. The doctrines of collateral estoppel and res judicata barred the resentencing court from altering the same criminal conduct finding for offender score purposes. Remand for resentencing is required.

The doctrine of collateral estoppel is embodied in the Fifth Amendment to the United State Constitution's guarantee against double jeopardy. State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003). Also known as issue preclusion, the doctrine prohibits the relitigation of an issue of ultimate fact between the same parties that has previously been determined by a valid and final judgment. Id. The policy behind collateral estoppel is to "prevent[ ] relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to

litigate his or her case." Rains v. State, 100 Wn.2d 660, 666, 674 P.2d 165 (1983); Nielsen v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262, 956 P.2d 312 (1998).

Similarly, res judicata bars the relitigation of claims that were litigated, or might have been litigated, in a prior action. Weaver v. City of Everett, 4 Wn. App. 2d 303, 315, 421 P.3d 1013 (2018) (citing Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978)). Thus, res judicata is generally referred to as claim preclusion, and collateral estoppel as issue preclusion. Id.

Both res judicata and collateral estoppel apply in criminal cases. Tili, 148 Wn.2d at 360; State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). The applicable tests for collateral estoppel and res judicata are similar.

Collateral estoppel precludes the relitigation of an issue when: (1) the issue in the prior adjudication is identical to the issue currently presented for review; (2) the prior adjudication was a final judgement on the merits; (3) the party against whom

the doctrine is asserted was a party to, or in privity, with a party to the prior adjudication; and (4) barring the relitgation of the issue will not work an injustice on the party against whom the doctrine is applied. State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003).

Causes of action are identical for res judicata if: (1) prosecution of the later action impairs the rights established in the earlier action; (2) the evidence in both actions is substantially the same; (3) infringement of the same right is alleged in both actions; and (4) the actions arise out of the same nucleus of facts. Civil Serv. Comm'n v. City of Kelso, 137 Wn.2d 166, 171, 969 P.2d 474 (1999).

Whether collateral estoppel or res judicata apply to preclude litigation is a question of law this Court reviews de novo. Lemond v. State, Dept. of Licensing, 143 Wn. App. 797, 803, 180 P.3d 829 (2008) (collateral estoppel) (citing State v. Vasquez, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001), aff'd, 148 Wn.2d 303, 59 P.3d 648 (2002)); Lynn v. Dept. of Labor &

Indus., 130 Wn. App. 829, 837, 125 P.3d 202 (2005) (res judicata) (citing Kuhlman v. Thomas, 78 Wn. App. 115, 119-20, 897 P.2d 365 (1995)).

Each of the requirements of collateral estoppel and res judicata are satisfied in this case. First, the legal and factual issue is identical, whether Widmer's 2007 convictions for first degree burglary and first degree robbery encompassed the same criminal conduct.

At the original 2008 sentencing the prosecutor argued that none of Widmer's offenses constituted the same criminal conduct. 1RP 427-28. As the prosecutor admitted, however, even under the burglary anti-merger statute, the court had discretion to find the offenses constituted the same criminal conduct. 1RP 428. Following the prosecutor's argument, the sentencing recognized that under RCW 9A.52.050, it had the authority to separately punish the robbery and burglary, but instead exercised its discretion and chose not to, concluding they constituted the same criminal conduct. 1RP 430-31, 438.

The prosecutor's argument against same criminal conduct at the 2022 resentencing hearing did not hinge on newly gathered facts or law. Indeed, the prosecutor argued the original sentencing court's same criminal conduct finding was simply "an incorrect decision" before again citing to the anti-burglary merger statute. 2RP 13. The first requirement is therefore met.

Second, a final judgement on the merits includes any prior adjudication of an issue "'that is determined to be sufficiently firm to be accorded conclusive effect.'" Cunningham v. State, 61 Wn. App. 562, 567, 811 P.2d 225 (1991) (quoting Restatement (Second) of Judgments § 13 (1982)). Though the final judgment rule is applied rigidly in the context of res judicata, it is less stringent with collateral estoppel and "will typically arise from a definitive order in the previous proceedings." 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35:34 (2d ed. 2009). Factors to consider include: (1) whether the prior decision was adequately

deliberated, (2) whether the decision was firm, rather than tentative, (3) whether the parties were fully heard, (4) whether the court supported its decision with a reasoned opinion, and (5) whether the decision is appealable. Cunningham, 61 Wn. App. at 567.

Each of the factors for determining finality are satisfied here. Both the prosecution and the defense had an opportunity to provide argument on the same criminal conduct issue. See RP 427-30. The court's final decision concerning same criminal conduct was supported by clear reasoning. RP 431, 438. Finally, the same criminal conduct finding could have been appealed by the State, but it chose not to do so. RP 16. A judgement becomes final for preclusion purposes at the beginning, not the end, of the appellate process. Nielsen, 135 Wn.2d at 264.

The third prong is easily satisfied: both the State and Widmer were parties to the original 2008 sentencing and the 2022 resentencing.

Lastly, application of collateral estoppel is not unjust when the party against whom it is enforced "had an unencumbered, full and fair opportunity to litigate his claim in a neutral forum." Rains, 100 Wn.2d at 666; Nielsen, 135 Wn.2d at 265. As argued above, here the prosecution had a full and fair opportunity to litigate the same criminal conduct issue, both at the 2008 sentencing, and on appeal. See State v. Sherwood, 71 Wn. App. 481, 488, 860 P.2d 407 (1993) (concluding the State was not entitled to reopen prior judgements and sentences because they became final when they were not appealed), rev. denied, 123 Wn.2d 1022, 875 P.2d 635 (1994)).

Despite these principles, the prosecution may argue that collateral estoppel does not apply because upon resentencing Widmer's original sentence ceased to be a final judgement on the merits. Compare State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) ("'[T]he finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced' is unaffected by the reversal of one or more

counts.") with State v. Waller, 197 Wn.2d 218, 228, 481 P.3d 515 (2021) (Granting a CrR 7.8 motion vacates the old sentence until the defendant can be resentenced); Harrison, 148 Wn.2d at 562 (finding collateral estoppel did not apply where sentences were reversed on appeal causing prior sentence to cease being a final judgment on the merits). Such an argument should be rejected for several reasons.

First, Waller and Harrison are not inconsistent with the principles underlying collateral estoppel and res judicata, which are to "prevent prelitigation of determined causes, curtail multiplicity of actions, prevent harassment in the courts, inconvenience to the litigants and judicial economy." Sherwood, 71 Wn. App. at 488 (citing State v. Dupard, 93 Wn.2d 268, 272, 609 P.2d 961 (1980)). Indeed, collateral estoppel is not to be applied with a "hypertechnical" approach, but rather, "with realism and rationality." Harrison, 148 Wn.2d at 561.

In Harrison, for example, the Court rejected the State's collateral estoppel and "law of the case" arguments and held that Harrison was entitled to a completely new sentencing hearing where the trial court could again consider imposition of an exceptional sentence because the original sentence was tainted by the State's breach of the plea agreement and Harrison was entitled to specific performance. Harrison, 148 Wn.2d at 558-59, 563. Significant to the Supreme Court's determination was that neither of the prior appeals had considered the merits of the exceptional sentence, and to require the resentencing court to impose an exceptional sentence would result in a manifest injustice to Harrison. Id. at 563.

In contrast, in State v. Collicott, the Supreme Court concluded that upon remand for resentencing, the trial court was collaterally estopped from imposing an exceptional sentence based on aggravating factors that had been considered at the original sentencing and rejected as a basis for an

exceptional sentence. 118 Wn.2d 649, 661, 827 P.2d 263 (1992) (plurality opinion).

Collicott remains good law. Although it was called into question by Tili because it did not command a majority, the Tili court explicitly decided not to overrule Collicott. Tili, 148 Wn.2d at 364. Instead, Tili distinguished Collicott on its particular facts. Id. at 363-64; See also, State v. Brown, 193 Wn.2d 280, 287, 440 P.3d 962 (2019) (also distinguishing Collicott on its facts rather than overruling).

In Tili, the defendant was originally sentenced to 417 months for three separate counts of rape for three separate acts of penetration, resulting in consecutive sentences. Id. at 356-57, 362. The original sentencing court did not impose an exceptional sentence but noted that if the rapes were considered the same criminal conduct on appeal, then the court would have imposed an exceptional upward sentence. Id. at 357.

The Court of Appeals remanded for resentencing, holding that the rapes constituted same criminal conduct. Id. At

resentencing, the court again sentenced Tili to 417 months, this time by imposing an exceptional sentence based on deliberate cruelty, vulnerability of the victim, and the multiple penetrations. Id.

After the second appeal, the Supreme Court held that collateral estoppel did not prevent an exceptional sentence in Tili's case because the court that resentenced Tili was faced with a different sentencing context. Id. at 362. In the first sentencing, the court had to determine whether an exceptional sentence was warranted even though the court had already imposed three consecutive rape sentences. Id. at 362-63.

In resentencing, the standard range sentence was significantly lower because the rape convictions were considered the same criminal conduct and, therefore, not subject to consecutive sentences. Id. at 363. Whether the crime warranted an exceptional sentence above the much lower standard range posed a different issue to the trial court. Id.

Hence, the issue decided in the first sentencing was not identical to that decided in the second. Id.

Widmer's case is more similar to Collicott than Tili. Here the original sentencing court exercised its discretion and explicitly determined the burglary and robbery constituted same criminal conduct. The State did not appeal this finding, but nonetheless asked the resentencing court to reconsider its prior finding. But the resentencing court was not faced with a different sentencing context. It merely had to resentence Widmer to a standard range sentence based on an offender score that did not include his prior out state conviction for possession of a controlled substance. Allowing the trial court to reconsider its prior same criminal conduct finding for the first time during resentencing results in a manifest injustice to Widmer and violates the principles underlying collateral estoppel and res judicata.

Any argument that collateral estoppel is not applicable also fails for a second reason. If a prior sentencing court found

that the convictions were the same criminal conduct, then the current sentencing court must count them as one offense. RCW 9.94A.525(5)(a)(i); State v. Williams, 176 Wn. App. 138, 141, 307 P.3d 819 (2013), aff'd, 181 Wn.2d 795, 336 P.3d 1152 (2014); see also, State v. Blakely, 61 Wn. App. 595, 599, 811 P.2d 965 (1991) (doctrine of collateral estoppel barred defendant from challenging previous sentencing court's determination that his offenses were not the same criminal conduct at a later sentencing hearing).

Any event that occurs prior to the relevant final sentencing decision is a prior event with respect to that decision. RCW 9.94A.525(1); See Collicott, 118 Wn.2d at 664-65 (holding that a conviction entered before the date of resentencing, although entered after the date of the initial sentencing was a "prior conviction" for purposes of calculating an offender score). As this Court in State v. Schilling, explained, an "offender score includes *all* prior convictions (as defined by RCW 9.94A.030(9)) existing at the time of that

particular sentencing, without regard to when the underlying incidents occurred, the chronological relationship among the convictions, or the sentencing or resentencing chronology." 77 Wn. App. 166, 175, 889 P.2d 948 (emphasis in original), rev. denied, 127 Wn.2d 1006 (1995).

Under RCW 9.94A.525(5)(a)(i) and the reasoning of Schilling then, because the original sentencing court determined the crimes were the same criminal conduct—and the state did not appeal—the resentencing court was required to score them in the same fashion. This result follows from case law, the language of the statute, and is consistent with application of collateral estoppel to SRA scoring.

Widmer's case must be remanded for resentencing where his burglary and robbery convictions are counted as same criminal conduct for offender score purposes.

### 4. Discretionary community custody supervision fees should be stricken from the amended judgment and sentence.

The resentencing court imposed only mandatory financial obligations on Widmer based on indigency. CP 125, 129-30; RP 33. At resentencing, the trial court stated, "I do find that he's presently indigent and will waive non-mandatory financial obligations." RP 33. Nonetheless, the amended judgment and sentence requires Widmer to "pay supervision fees as determined by" the Department of Corrections as a condition of community custody. CP 128 (condition 7).

The community custody supervision fees are discretionary legal financial obligations. State v. Bowman, 198 Wn.2d 609. 629, 498 P.3d 478 (2021). Because they are discretionary, they may be stricken if it appears they would not have been imposed had the court exercised its discretion. Id. Because the trial court imposed only mandatory financial obligations and stated it would not impose discretionary financial obligations based on indigency, the discretionary

community custody supervision fees should be stricken from the amended judgment and sentence. See Id.

D. CONCLUSION

For the reasons discussed above, this Court should remand Widmer's case for resentencing.

**I certify that this document contains 6,895 words, excluding those portions exempt under RAP 18.17.**

DATED this 25th day of October, 2022.

Respectfully submitted,
NIELSEN KOCH & GRANNIS, PLLC

JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

## NIELSEN KOCH & GRANNIS P.L.L.C.

## October 25, 2022 - 11:18 AM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division II |
| **Appellate Court Case Number:** | 56784-9 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Bert Lee Widmer, Appellant |
| **Superior Court Case Number:** | 06-1-01670-0 |

**The following documents have been uploaded:**

- 567849_Briefs_20221025111804D2109710_9142.pdf
  This File Contains:
  Briefs - Appellants
  *The Original File Name was State v. Bert Widmer 56784-9-II.BOA.pdf*

**A copy of the uploaded files will be sent to:**

- Sloanej@nwattorney.net
- aaron.bartlett@clark.wa.gov
- cntypa.generaldelivery@clark.wa.gov

**Comments:**

Copy mailed to appellant

---

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
**Filing on Behalf of:** Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email: )

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

**Note: The Filing Id is 20221025111804D2109710**